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In The

Supreme Court of the United States

October Term, 1979

No. 79-105

CURTISS-WRIGHT CORPORATION,

Petitioner,

vs.

GENERAL ELECTRIC COMPANY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

RALPH N. DEL DEO
RICHARD S. ZACKIN
CRUMMY, DEL DEO,
DOLAN & PURCELL
Attorneys for Petitioner
Gateway 1
Newark, New Jersey 07102
(201) 622-2235

DAVID LASKY
ALFRED J. KOVELL
Of Counsel

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals is reported at 597 F.2d 35 (Appendix, 218a-232a, 243a-245a). The petition for rehearing with suggestion for rehearing *en banc* was denied at 599 F.2d 1259 (246a-261a). The district court opinion is unreported (196a-199a).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on April 17, 1979. A timely petition for rehearing was denied on June 4, 1979 (246a-247a). A petition for certiorari was filed on July 20, 1979 and was granted October 1, 1979. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Did the existence of a counterclaim deprive the district court of discretion to grant final certification of judgments in favor of petitioner, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, on claims factually and legally unrelated to the counterclaim even though the district court (a) determined that there was no just reason for delay and (b) provided a carefully considered written statement of all relevant factors supporting its entry of final judgment?

2. Did the district court abuse its discretion by considering the economic loss of more than $1 million per year which would result from a failure to certify as a factor in favor of granting certification pursuant to Rule 54(b) of the Federal Rules of Civil Procedure?

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The relevant Federal Rule of Civil Procedure is Rule 54(b) which states:

> "(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

STATEMENT OF THE CASE

Between May 1, 1968 and December 21, 1972, Curtiss-Wright Corporation ("Curtiss-Wright") entered into a series of 21 military procurement subcontracts with the General Electric Company ("GE"), a prime contractor for the United States Navy. The subcontracts called for Curtiss-Wright to manufacture and deliver 167 large components designed for use in nuclear powered naval vessels. Although Curtiss-Wright has successfully completed the manufacture and delivery of all of the components in conformity with contract specifications, GE has withheld $18,914,408 of the contract price. The amount of this unpaid balance is not in dispute.

In connection with these subcontracts, Curtiss-Wright brought suit against GE pursuant to the district court's diversity jurisdiction alleging fraud, misrepresentation and contractual breaches and seeking damages and reformation of the subcontracts (6a-41a). In addition, Curtiss-Wright sought payment from GE of the outstanding contract balance — $18,914,408 (78a-80a, 208a-209a). GE, for its part, interposed counterclaims based upon alleged extraordinary assistance rendered by GE to Curtiss-Wright (63a-70a).

Curtiss-Wright then moved for summary judgment on those counts of the complaint which sought to recover the unpaid contract balance of $18,914,408. GE asserted only one ground in opposition to the motion, namely "Article 5c," a contractual provision which GE contended required Curtiss-Wright to release GE and the Government from all other claims pertaining to the 21 subcontracts prior to payment of the contract balance.[1] The district court, however, ruled that under New York law, "Article 5c" was not a bar to the entry of summary judgment and granted Curtiss-Wright's motion.[2] The court also awarded Curtiss-Wright prejudgment interest at the rate of 6 percent simple interest per year.[3]

Thereafter, the district court entered these judgments as final and made both (a) the "express direction" for entry of judgment and (b) the determination that there was "no just reason for delay" as required by Rule 54(b) of the Federal Rules of Civil Procedure (200a, 214a).

In an opinion issued concurrently with its order of final judgment, the district court provided a carefully reasoned statement in support of its decision (196a-199a). The court concluded, *inter alia*:

(1) Entry of final judgment could not, in any way, result in unnecessary appellate review;

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1. GE also asserted that Curtiss-Wright had not completed performance on certain minor aspects of some of the subcontracts. These matters, however, were resolved while the motion was pending and are not relevant here.

2. 164a-172a. On appeal neither party challenged the district court's determination that New York law controls the issue raised by the summary judgment motion in this diversity case.

3. The court ruled that New York law likewise controlled the rate of prejudgment interest (180a-187a).

(2) The claims on which final judgment was entered are separate, distinct, and independent of any of the other claims or counterclaims involved in the lawsuit;

(3) Final judgment will not prevent the rest of the case from being prepared for trial;

(4) The need for appellate review of the claims on which final judgment was entered will not be mooted by any future developments in the district court;

(5) The determinations by the district court regarding the claims on which final judgment was entered will not be changed by later developments in the district court;

(6) The appellate courts will not need to decide the same issues more than once if two appeals should arise out of this case;

(7) Justice to the litigants will be advanced by the entry of final judgment because (a) with prejudgment interest fixed by law at 6 percent simple interest, under modern-day interest rates Curtiss-Wright will suffer daily financial losses from the non-payment of the liquidated debts embodied in the final judgments and (b) due to the complex nature of the remaining claims in suit the delay in payment which would result from a failure to enter final judgment "would span many months, if not years" and "great injustice would result from further delay" (198a);

(8) Curtiss-Wright is financially sound and will be able to satisfy a judgment on GE's counterclaim should such a judgment ever be entered;

(9) In the opinion of the district court, all of the above factors in favor of the entry of final judgment outweighed the presence of GE's counterclaim and the possibility of a setoff.

The Court of Appeals for the Third Circuit, with one judge dissenting, reversed the district court with the direction to vacate so much of the lower court's judgment as purported to render a final judgment pursuant to Rule 54(b). 597 F.2d 35 (218a-232a). The court held that the existence of a pending counterclaim barred Rule 54(b) certification absent "unusual or harsh circumstances." The court also held that the economic loss to Curtiss-Wright which would result from a failure to certify, as described by the district court, while "indeed harsh from Curtiss's viewpoint," did not constitute "unusual or harsh circumstances" justifying the entry of Rule 54(b) certification. 597 F.2d at 36 (222a-223a). Curtiss-Wright's petition for rehearing *en banc* was denied, although four judges voted for the rehearing, three against with two judges recusing themselves. 599 F.2d at 1259 (246a-247a).

SUMMARY OF ARGUMENT

Curtiss-Wright maintains that the district court properly exercised its discretion under Rule 54(b) when it entered final judgment in Curtiss-Wright's favor in the amount of $18,914,408 on claims that are factually and legally unrelated to GE's counterclaims or any other claim in suit. This exercise of discretion is also supported by the district court's finding that a failure to enter final judgment would have unjustly deprived Curtiss-Wright of its property.

Rule 54(b) provides a mechanism whereby the district court in a multiple claims action can enter final judgment on less than all claims in suit. The purpose of the rule is to avoid injustice which may be caused by delay in judgment on a distinctly separate claim pending adjudication of the entire case. The rule empowers the district court to enter a final judgment on a single claim upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. There are no other conditions enumerated in the rule.

In the present case the district court meticulously adhered to each and every requirement of the rule. The only point at issue is whether the district court's express determination that there was no just reason for delaying the entry of judgment constituted an abuse of discretion. An analysis of the history and purpose of Rule 54(b) clearly demonstrates that the district court's exercise of discretion was entirely proper and should not have been disturbed on appeal.

With the adoption of the Federal Rules of Civil Procedure allowing a more liberal joinder of claims than in the past, it became clear that in multiple claims cases injustice could result from delays in entering judgment on individual claims factually and legally unrelated to any of the remaining claims in suit. Thus Rule 54(b) was adopted to permit the district court in its discretion to avoid such injustice.

The United States Supreme Court in *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956), and *Cold Metal Process Co. v. United Engineering & Foundry Co.*, 351 U.S. 445 (1956), made clear that the discretion afforded the district judge by the rule does not depend upon the "type" of unadjudicated claims, including counterclaims, that would remain in suit after entry of final judgment. The Supreme Court held that under the rule, the primary factor having an impact on the district court's discretion is the factual and legal relationship between the adjudicated and unadjudicated claims. Under Rule 54(b), the district court is free to exercise its discretion to enter a final judgment where claims are sufficiently unrelated and can be decided independently of one another.

Since the adoption of Rule 54(b), the courts have reasoned that the entry of final judgment would be improper only when an immediate appeal of a finally adjudicated claim would generate multiple appeals on the same issues, delay the trial of the remaining claims or be premature for some like reason.

The district judge below in a well-reasoned opinion (196a-199a) demonstrated beyond any doubt that the evils of a premature or "piecemeal" appeal are totally absent in this case. His findings in this regard were expressly noted and unchallenged by the court of appeals. 597 F.2d at 36 (231a).

The district court also concluded that the failure to enter final judgment under Rule 54(b) would cause Curtiss-Wright to suffer severe financial losses. The court considered the existence of GE's counterclaim and the possibility of a setoff but expressly determined that this factor was outweighed by the injustice to Curtiss-Wright of having to wait for a protracted period of time before it could obtain final payment (199a).

Yet the Third Circuit concluded that the district court abused its discretion. The appellate court held that the district court is prohibited from making final a money judgment whenever a pending counterclaim poses the possibility of a setoff "in the absence of unusual or harsh circumstances." The court, although recognizing that the loss to Curtiss-Wright occasioned by the delay in entry of final judgment was "indeed harsh," inexplicably ruled that this harshness was not "unusual or harsh circumstances." 597 F.2d at 36 (222a).

Both the holding and the reasoning of the Third Circuit are contrary to the plain language and purpose of Rule 54(b) and the holdings in *Sears, Roebuck & Co. v. Mackey, supra,* and *Cold Metal Process Co. v. United Engineering & Foundry Co., supra.* Moreover, there is simply no precedent to support the Third Circuit's position.

The Third Circuit's decision throws the operation of the Federal Rules of Civil Procedure into complete disorder:

First, the Circuit has created a virtual *per se* barrier to the entry of a final money judgment whenever a counterclaim poses

the mere possibility of a setoff. This result for all practical purposes divests the district court of its discretion under the rule in such circumstances.

Second, the result reached by the appellate court is more than disturbing in that it will obviously encourage the filing of contrived counterclaims solely for the purpose of delaying payment of debts due and owing.

Third, the Third Circuit's standard of "unusual and harsh circumstances" is ambiguous and provides absolutely no guidance to the district courts in making determinations under Rule 54(b).

Finally, by holding that considerations of setoff, insolvency and economic duress are relevant to determinations under Rule 54(b), the appellate court has, in reality, rewritten the rule making it one which governs not only the entry of final judgments but the enforcement of those judgments as well. Rule 62(h) has been specifically adopted to deal with the enforcement of judgments entered under Rule 54(b) and provides the district court with the mechanisms to deal with questions of setoff, insolvency and the like. Without explanation the Third Circuit ignores Rule 62(h) in stark contrast to the rest of the federal judicial system, which uniformly deals with factors such as setoff and insolvency solely within the context of Rule 62(h) — not Rule 54(b).

It is clear that the district court's entry of final judgment in this case conformed both to the letter and spirit of Rule 54(b) and cannot under any rational interpretation of that rule be held to have constituted an abuse of discretion. The injustice inherent in any delay of a party's ability to enjoy the benefits of a judgment in its favor is alone sufficient to warrant the application of Rule 54(b). If something more is required, the severe financial injustice to Curtiss-Wright caused by the

disparity between the prejudgment interest rate of only 6 percent simple interest per year and the substantially higher modern-day interest rates makes this case one which mandates the application of the rule.

The Third Circuit, however, in its preoccupation with considerations bearing only upon enforcement of judgments has thwarted the intent of the framers of the rule and has reached a result which will lead only to unjust results in future cases as it has in this case.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY ENTERED FINAL JUDGMENTS PURSUANT TO RULE 54(b) ON ITS ORDERS GRANTING CURTISS-WRIGHT PARTIAL SUMMARY JUDGMENT.

A. Rule 54(b) permits the district court to enter final judgment on less than all of the claims in suit when the adjudicated claims are independent of the unadjudicated claims.

Rule 54(b) expressly empowers the district court to enter final judgment on one or more but less than all claims in suit upon the court's express determination that there is "no just reason for delay."

> "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment." Fed. R. Civ. P. 54(b).

In *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 431-32 (1956) (hereinafter "*Sears*"), this Court noted that prior to the adoption of Rule 54(b), a judgment or order disposing of some but less than all the claims between the parties was not "final" and generally not appealable. *See, e.g., Arnold v. United States*, 263 U.S. 427, 434 (1923); *Bowker v. United States*, 186 U.S. 135, 139-41 (1902). The obvious purpose of Rule 54(b) is to avoid injustice which may be caused by the delay in judgment on a distinctly separate claim pending adjudication of the entire case.[4]

As the Court in *Sears* made clear:

> "With the Federal Rules of Civil Procedure, there came an increased opportunity for the liberal joinder of claims in multiple claims actions. This, in turn, demonstrated a need for relaxing the restrictions upon what should be treated as a judicial unit for purposes of appellate jurisdiction. Sound judicial administration did not require relaxation of the standard of finality in the disposition of the individual adjudicated claims for the purpose of their appealability. It did, however, demonstrate that, at least in multiple claims actions, some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on all of the

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4. *See* Advisory Committee Note to 1946 Amendment, 28 U.S.C.A. Fed. R. Civ. P. 54(b) (". . . Rule 54(b) was originally adopted . . . in order to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case."). In *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511-12 (1950), the Court noted the purpose of the rule although it decided the case on other grounds.

claims. Largely to meet this need, in 1939, Rule 54(b) was promulgated. . . ."[5] 351 U.S. at 432-33.

Entry of a final judgment under the rule has at least two important consequences:[6] (1) it permits the losing party to take an immediate appeal of the judgment, and (2) it permits the prevailing party to execute on that judgment.[7] 6 *Moore's Federal Practice* ¶¶ 54.28[1], 54.42 (2d ed. 1976). Therefore, Rule 54(b) serves the salutary purpose of empowering the district court "to determine from the standpoint of justice to the litigants the best time at which to terminate by final judgment the litigation with respect to a single claim in a multiple claims suit and thus to open the way to immediate appellate review and execution of the judgment." *Bendix Aviation Corp. v. Glass,* 195 F.2d 267, 272 (3d Cir. 1952) (*en banc*).[8]

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5. The Court was careful to note that it was not the intent of Rule 54(b) to make appealable purely interlocutory orders involved in a single claim, but that a *final adjudication* of a single claim could now be appealed. In the present case there is no question that the orders of the district court appealed from are *final* dispositions of separate claims. Thus this case does not present an interlocutory appeal prohibited by 28 U.S.C. §1291.

6. Other consequences of Rule 54(b) certification are that the judgment is res judicata as between the parties and that post judgment interest will run from the date of entry of a certified final order. Certification also permits creation of a lien on the judgment debtor's property, satisfies the final judgment requirement for issuance of a writ of execution upon which a lien may then be created, and determines priority of judgment liens. 6 *Moore's Federal Practice,* ¶54.42 (2d ed. 1976).

7. Fed. R. Civ. P. 62(h) permits the district court to stay enforcement of a judgment entered under Rule 54(b) and impose conditions to secure the benefit to the holder thereof. *See* II B, *infra,* at 25-29.

8. Little authority need be cited for the fact that the anticipated increase in multiple claims litigation has been realized perhaps even beyond the expectation of the drafters of Rule 54(b). *See generally* Fraser, *Jurisdiction of the Federal Courts of Actions Involving Multiple Claims,* 76 F.R.D. 525 (1976); Note, *The Challenge of the Mass Trial,* 68 Harv. L. Rev. 1046 (1955); thus, Rule 54(b) serves more than ever as a valuable tool to assist the district courts in their primary responsibility of dispensing justice to litigants.

The dramatic change which Rule 54(b) made in the former general practice with regard to appealability of judgments is illustrated in both *Sears* and its companion case, *Cold Metal Process Co. v. United Engineering & Foundry Co.,* 351 U.S. 445 (1956) (hereinafter "*Cold Metal*"). Both cases make clear that in multiple claims litigation a district court may find that there is "no just reason for delay," within the meaning of Rule 54(b), to enter final judgment on an adjudicated claim when the court has determined that that claim is sufficiently separable from the remaining claims in suit and can be independently decided.

In *Sears,* plaintiffs brought a four count complaint. Count I charged that defendant violated the Sherman Antitrust Act; count II realleged certain allegations of count I on a diversity of citizenship jurisdictional basis; counts III and IV alleged common law unfair competition and patent infringement claims. The district court dismissed counts I and II and entered a final judgment under Rule 54(b) on its order of dismissal. 351 U.S. at 430-31.

Plaintiffs appealed seeking to reverse the district court and to have counts I and II restored; defendant moved to dismiss the appeal on the grounds that the district court's order was not a final judgment. The Supreme Court refused to dismiss the appeal and sustained the district court's entry of final judgment:

> ". . . The grounds for such a motion [to dismiss the appeal] might be (1) that the judgment of the District Court was not a decision upon a 'claim for relief,' (2) that the decision was not a 'final decision' in the sense of an ultimate disposition of an individual claim entered in the course of a multiple claims action, or (3) that the District Court abused its discretion in certifying the order.
>
> In the case before us, there is no doubt that each of the claims dismissed is a 'claim for relief'

> within the meaning of Rule 54(b), or that their dismissal constitutes a 'final decision' on individual claims. Also, it cannot well be argued that the claims stated in Counts I and II are so inherently inseparable from, or closely related to, those stated in Counts III and IV that the District Court has abused its discretion in certifying that there exists no just reason for delay. They certainly *can* be decided independently of each other." *Id.* at 436.

The Court further noted that even though the claim in count I rested in part on some of the facts involved in counts III and IV, the "*basis of liability* in Count I is *independent* of that on which the claims in Counts III and IV depend." *Id.* at 437 n. 9 (emphasis added). It is obvious from the Court's decision that when the district court renders a final adjudication on a claim, and when the proper disposition of that claim will be unaffected by any of the remaining claims in suit, there is no just reason for delay under Rule 54(b).[9]

9. Since the adoption of Rule 54(b), courts which in essence have found "a just reason for delay" under Rule 54(b) have looked to the underlying facts and legal issues involved in the adjudicated and unadjudicated claims, rather than to merely the "type" of claim, and have determined that an immediate appeal of the adjudicated claim would be premature either because: (1) of the possibility of mootness, (2) of the possibility of duplicative appellate review of the same issues, (3) such an appeal would serve only to delay the final disposition of the remaining claims in suit or (4) any combination of these reasons. *See, e.g., Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313 (9th Cir. 1979); *Brunswick Corp. v. Sheridan*, 582 F.2d 175 (2d Cir. 1978); *Campbell v. Westmoreland Farm, Inc.*, 403 F.2d 939 (2d Cir. 1968); *Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc.*, 271 F.2d 257 (7th Cir. 1959), *cert. denied*, 362 U.S. 928 (1960); *Panichella v. Pennsylvania Railroad Company*, 252 F.2d 452 (3d Cir. 1958); *Northway, Inc. v. TSC Industries, Inc.*, 361 F. Supp. 108 (N.D. Ill. 1973), *aff'd in part, rev'd in part on other grounds*, 512 F.2d 324, *rev'd on other grounds*, 426 U.S. 438 (1976); *Liquilux Gas Services of Ponce, Inc. v. Tropical Gas Co., Inc.*, 48 F.R.D. 330 (D.P.R. 1969). In the instant case, none of these "just reasons for delay" are present, and this case is not one where the rule against "piecemeal" appeals has been violated. *See* I B, *infra*, at 16-18.

Prior to Rule 54(b), courts had generally held that the mere pendency of an unadjudicated counterclaim was a barrier to the entry of a final judgment on an order disposing of less than the entire litigation.[10] In *Cold Metal*, the Court noted the prior practice, 351 U.S. at 451, but held that Rule 54(b) makes no distinction between counterclaims and any other type of claim and that counterclaims "are thus equated with the others" in the Rule 54(b) determination process. *Id.* at 452.[11] Accordingly, the Court ruled that its reasoning in *Sears* was also applicable in cases where counterclaims were present and concluded that under Rule 54(b) a district court is free to consider that the adjudicated claim and the unadjudicated counterclaim are sufficiently unrelated so as not to be a just reason for delay.[12] *Id. See* 6 *Moore's Federal Practice, supra,* ¶54.35[1].

To summarize, in multiple claims actions, the district court in its discretion may enter final judgment under Rule 54(b) on a

10. *See, e.g., Bowker v. United States*, 186 U.S. 135 (1902); *Ayres v. Carver*, 58 U.S. (17 How.) 591, 595 (1855); *Toomey v. Toomey*, 149 F.2d 19 (D.C. Cir. 1945); *Radio Corp. v. J.H. Bunnell & Co.*, 298 F. 62 (2d Cir. 1924), *cert. denied*, 269 U.S. 565 (1925); 6 *Moore's Federal Practice, supra,* ¶¶54.20, 54.23[2].

11. The Court in *Cold Metal* held that the rule as amended also makes no distinction between compulsory and permissive counterclaims. 351 U.S. at 452. The original Rule 54(b) did not permit entry of final judgment when the unadjudicated counterclaim arose out of the same "transaction or occurrence" as the adjudicated claim. *See Reeves v. Beardall*, 316 U.S. 283 (1942). In the 1946 amendment, the "transaction or occurrence" language was deleted thus making clear that even a compulsory counterclaim was to be considered no differently than any other unadjudicated claim in the district court's exercise of discretion under the rule.

12. The dissenting opinion in *Cold Metal* argued that Rule 54(b) did no more than codify pre-existing law, and accordingly, that the presence of the counterclaim, substantially based on the same transactions as the adjudicated claim, presented an absolute barrier to certification. 351 U.S. at 439, 443 (Jackson, J., dissenting). The dissent thus highlights the break which Rule 54(b) made with former practice.

single claim and thus avoid an injustice caused by a delay in judgment when the facts and legal issues involved in that claim are sufficiently unrelated to the remaining claims in suit including any counterclaims. Under such circumstances the appeal of the adjudicated claim will not be premature.

B. The district court properly exercised its discretion in entering final judgments pursuant to Rule 54(b) on its orders granting Curtiss-Wright partial summary judgment.

As noted in the Statement of the Case, Curtiss-Wright pursuant to 21 subcontracts manufactured and delivered to GE 167 large components ultimately intended for use in the propulsion systems of nuclear powered surface ships and submarines. GE has never contended in this litigation that the components manufactured by Curtiss-Wright failed to meet specifications or were in any other way defective. Nevertheless, GE has withheld payment of a substantial portion of the contract price — $18,914,408.[13]

The only legal issue involved in the motion for summary judgment on the claims for final payment was whether a certain contractual provision, "Article 5(c)," applicable to each of the 21 subcontracts, permits GE to withhold final payment until such time as Curtiss-Wright shall have released GE and the Government from any other claims under the subcontracts. Since the relevant facts were not in dispute, the district court proceeded to determine this sole legal issue in favor of Curtiss-Wright (164a-172a), and granted Curtiss-Wright's motions for summary judgment on those counts of the complaint which embodied the claims for final payment (175a-177a). The issue of "Article 5c" is not present in any of the other claims in suit.

The court's decision to enter final judgment pursuant to Rule 54(b) on its summary judgment orders was a proper

13. Some of these payments have been due and owing since November 30, 1975 (186a).

exercise of the court's discretion and recognized the injustice its action was preventing. In a well considered opinion (196a-199a), the court clearly demonstrated that there was no just reason for delay by finding as follows:

First, the district court determined that Curtiss-Wright's claims for final payment "are separate, distinct, and independent of any of the other claims or counterclaims involved in this lawsuit." (197a). This determination was eminently correct and unchallenged by the court of appeals. 597 F.2d at 36 (221a).[14]

Second, the district court determined that because of the independence of the claims for final payment from the remaining claims in suit, entry of final judgment would not prevent the rest of the case from being prepared for trial. Neither the court of appeals nor GE have disputed this determination.

Third, the district court correctly concluded that the need

14. The claims for final payment rested on two very simple and undisputed facts: the delivery of the goods by Curtiss-Wright and GE's failure to pay the stipulated balance of the contract price. Curtiss-Wright's other claims are not involved in the summary judgment orders and concern allegations of substantial cost overruns and lost profits resulting from fraudulent inducement, misrepresentations, and various "extra work" claims (6a-41a). GE's counterclaims are similarly unrelated to Curtiss-Wright's claims for final payment, in that they seek to recover (1) claimed costs of alleged technical assistance and (2) alleged unjust enrichment based on the theory that GE prevented Curtiss-Wright from incurring a major default (63a-70a). The facts and legal issues relevant to Curtiss-Wright's remaining claims and GE's counterclaims have absolutely nothing to do with the few simple facts and sole legal issue relevant to Curtiss-Wright's claims for final payment. In this regard it should be noted, as reflected in the district court's opinion (164a-172a), that in opposing Curtiss-Wright's motion for summary judgment GE raised only "Article 5c" and never argued that its counterclaims or affirmative defenses raised facts or legal issues relevant to the court's determination of the motion.

for appellate review would not be mooted by any future developments in the district court.[15]

Fourth, the district court concluded that its determinations on the certified claims would not be changed by later developments in the district court. Neither the court of appeals nor GE have disputed this conclusion, and with good reason. As noted above, the adjudicated claims are factually and legally unrelated to the remaining claims and there is thus no danger that appellate review of the adjudicated claims will be premature.

Fifth, the district court concluded that the appellate courts would not be required to decide a second time the sole legal issue relating to the adjudicated claims, again demonstrating that appellate review would not be premature.

Finally, the district court noted that because of the complex nature of the unadjudicated claims "the delay in payment which would occur if certification is denied would span many months, if not years" (198a).[16] The court, though taking the counterclaim and the possibility of a setoff into consideration, concluded that there was no just reason why Curtiss-Wright should not have the benefit of its judgment, especially in light of the loss in interest

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15. In its first opinion the Third Circuit disagreed with this conclusion because it believed that counsel for GE had represented at oral argument that GE would not appeal on the issue of "Article 5(c)" once the remaining claims in suit had been resolved (222a). Counsel for GE, however, moved to strike this portion of the appellate court's opinion on the grounds that the court had misinterpreted his remarks and that he had not represented that GE would not appeal the district court's summary judgment orders (233a-235a). The court of appeals then amended its opinion accordingly, deleting all reference to the possibility of mootness (243a).

16. Indeed, more than a year already has elapsed since the district court filed its opinion in support of its entry of final judgments under Rule 54(b) (196a-199a).

alone based on the difference between the prejudgment rate of only 6 percent simple interest per annum as fixed by New York law [*see* N.Y. Civ. Prac. Law §5004 (McKinney)] and the interest rates prevalent in today's marketplace.[17] *See also, United Bank of Pueblo v. Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976). The Third Circuit acknowledged the harsh result arising from Curtiss-Wright's inability to obtain the money owed to it. 597 F.2d at 36 (222a).

Based on the foregoing it cannot be seriously maintained that the district court abused its discretion. Rule 54(b) firmly establishes the district court's primary authority to determine when its final adjudication of a claim is ripe for appeal.[18] The timing of that decision "is, with good reason, vested by the rule primarily in the discretion of the District Court as the one most likely to be familiar with the case and with any justifiable reasons for delay." *Sears*, 351 U.S. at 437.

The district court has considered the factors relevant to a Rule 54(b) judgment and stated its reasons clearly. This case is precisely the type of case for which Rule 54(b) was intended. There is absolutely no just reason for the district court to have

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17. The Court can take judicial notice of the fact that as of the date of this brief, the "prime rate" of interest is 15.5 percent, and Curtiss-Wright's losses on interest alone from the appellate court's vacation of final judgment currently amount to approximately $5,000 *per day* or $1,800,000 *per year*.

18. The mere fact that a second appeal on unrelated issues may at some future time materialize is not a just reason for delay. Rule 54(b) "undoubtedly affects the amount of grist available from time to time for the appellate mill. But so do a number of the other Civil Procedure Rules which have been upheld as appropriate district court procedure." *Bendix Aviation Corp. v. Glass, supra*, 195 F.2d at 271. Clearly when the district court determines that its final adjudication of a claim is ripe for appeal and acts within its discretion in entering a final judgment, the court of appeals is bound by the rule and should not substitute its judgment for that of the district judge. *See* dissenting opinion of Judge Rosenn in the case *sub judice*, 597 F.2d at 39 (229a).

delayed the entry of final judgment on Curtiss-Wright's claim for final payment. Indeed, all factors relevant to the question of final judgment lead inevitably to the conclusion that the district court's determination effectuated justice without causing a premature appeal. That there was no abuse of discretion is clear beyond any doubt whatsoever.

II.

THE COURT OF APPEALS HAS ERRED BY ESTABLISHING A VIRTUAL *PER SE* BARRIER TO THE DISTRICT COURT'S UTILIZATION OF RULE 54(b) IN CIVIL DAMAGE ACTIONS INVOLVING COUNTERCLAIMS.

A. The Third Circuit's holding that the mere pendency of a counterclaim is a barrier to the entry of final judgment under Rule 54(b) absent "unusual or harsh circumstances" is contrary to the plain language of the rule and to precedent, and interferes with the district court's ability to administer justice to litigants.

The plain language of Rule 54(b) contains no basis for the conclusion that the mere presence of an unadjudicated counterclaim constitutes a just reason for delaying the entry of final judgment on a claim included in the complaint.

As discussed in I, *supra*, the Supreme Court in *Cold Metal*, a case containing an unadjudicated monetary counterclaim, affirmed the entry of judgment on an adjudicated claim and stated that Rule 54(b) "treats counterclaims, whether compulsory or permissive, like other multiple claims." 351 U.S. at 452.

Notwithstanding the language of the rule and Supreme Court precedent, the Third Circuit in this case concluded that the district court improperly entered final judgments under Rule 54(b) on its orders awarding Curtiss-Wright the balance of the

purchase price on the 21 subcontracts in suit. The appellate court held that the entry of final judgment was improper because of the presence of the unadjudicated counterclaim. In so holding, the majority of the court claimed that it was bound by its earlier decision in *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 364 (3d Cir. 1975) (hereinafter "*Allis-Chalmers*"). There, the court stated in dictum that the presence of a counterclaim "weighs heavily" against the entry of final judgment "in the absence of unusual or harsh circumstances." *Id.* at 366.[19]

The sole rationale for the appellate court's decision below was that the presence of a counterclaim raised the possibility that some or all of Curtiss-Wright's judgment may one day have to be returned *if* defendant should prevail on its counterclaim.[20]

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19. Although the court of appeals below held that it was "bound" by *Allis-Chalmers*, it does not appear that the dictum in *Allis-Chalmers* necessarily leads to the result reached by the Third Circuit in the present case. The actual holding of *Allis-Chalmers* was that the district court must articulate its reasons for concluding that there is "no just reason for delay," and the case was remanded to the lower court for that purpose. The *Allis-Chalmers* court expressly declined to rule on whether the counterclaim in that case constituted a bar to Rule 54(b) certification. 521 F.2d at 367 n.16. Moreover, the *Allis-Chalmers* court, while expressing the opinion that the pending counterclaim "weighs heavily" against certification, appeared to articulate some sort of balancing test involving an analysis of the relationship between the adjudicated and unadjudicated claims. *Id.* at 365. The district court in this case undertook precisely this type of analysis and concluded that final judgment should be entered. *See* the dissenting opinion of Judge Rosenn in the case *sub judice*, 597 F.2d at 36 (223a-232a). The Third Circuit below, however, now apparently holds that the analysis discussed in *Allis-Chalmers* is irrelevant when a counterclaim is pending.

20. In holding that a possible setoff was a factor under Rule 54(b) the court completely ignored Rule 62(h) of the Federal Rules of Civil Procedure. *See* II B, *infra*, at 25-29. In addition, the appellate court apparently failed to consider the possibility that Curtiss-Wright might be awarded an amount on its remaining claims greater than any amount awarded to GE on the counterclaim.

The court of appeals acknowledged that from Curtiss-Wright's viewpoint the deprivation of the benefit of its judgment was "indeed harsh," but held that this deprivation did not constitute "unusual or harsh circumstances." 597 F.2d at 36 (222a).

The practical effect of the Third Circuit's reasoning is that the possibility of a setoff posed by the pending counterclaim creates a presumption against Rule 54(b) certification and, without more, constitutes a "just reason for delay." *See* the dissenting opinion of Judge Gibbons sur the denial of the petition for rehearing. 599 F.2d at 1262 (254a). This result has no basis in the plain language of the rule and is not supported by the prior decisions of this Court in *Sears* and *Cold Metal.*[21] In

21. Moreover, there is virtually no support in precedent for the Third Circuit's interpretation of Rule 54(b). The court below relied exclusively upon *Allis-Chalmers* which itself relied on only two prior cases, *TPO Incorporated v. Federal Deposit Insurance Corp.*, 487 F.2d 131 (3d Cir. 1973), and *Schroeter v. Ralph Wilson Plastics, Inc.*, 49 F.R.D. 323 (S.D.N.Y. 1969). Neither case, however, supports the proposition that a pending counterclaim "weighs heavily" against Rule 54(b) certification.

In *TPO* the court held that due to the nature of that counterclaim it would be premature to grant *summary judgment under Rule 56* of the Federal Rules of Civil Procedure. In the present case GE did not assert its counterclaim in opposition to Curtiss-Wright's motion for summary judgment. (*See* note 14, *supra.*) Moreover, an analysis of the claim and counterclaim in *TPO* demonstrates that they were completely interrelated factually and legally. *TPO* thus cannot stand for the proposition that the mere pendency of a counterclaim, especially one as in this case which is factually and legally unrelated to the adjudicated claims, stands as a barrier to entry of final judgment under Rule 54(b).

Schroeter v. Ralph Wilson Plastics, Inc., supra, was a case as in *TPO* where the only issue was whether the counterclaim barred the entry of summary judgment. The court indicated by way of dictum in a brief comment that the counterclaim was a factor relevant to a Rule 54(b) determination because of the possibility of a setoff. But it can hardly be argued that this passing remark supports the proposition that a pending counterclaim "weighs heavily" against the entry of final judgment. The great weight of authority is to the contrary. *See* the cases cited in note 29 *infra.*

addition, the appellate court's reasoning is contrary to the interests of sound judicial administration and justice to litigants.

As noted above, Rule 54(b) requires an analysis of the relationship, if any, between the factual and legal issues underlying the adjudicated and unadjudicated claims.[22] The district court below made this analysis and correctly concluded that there was no relationship sufficient to constitute a just reason for delay.

The Third Circuit by its reasoning makes the district court's analysis irrelevant, and virtually divests the district court of all discretion under Rule 54(b). This result directly contravenes the principle firmly established in *Sears* that the determination to release a finally adjudicated claim for appeal is vested by the rule primarily in the discretion of the district court for the obvious reason that that court is the one most likely to be familiar with the case and with any justifiable reasons for delay. 351 U.S. at 437. *Accord, Bendix Aviation Corp. v. Glass, supra,* 195 F. 2d at 272. In this case, the court's reasoning has led to the unfair and harsh result of permitting GE to have the benefit of all the goods which Curtiss-Wright has manufactured and at the same time retain a substantial portion of the contract price, while Curtiss-Wright's remaining claims and GE's counterclaims grind through a lengthy judicial process.

The abrogation of the district court's discretion to enter Rule 54(b) judgments in counterclaim cases will surely have an adverse impact on judicial administration and economy. In holding that a pending counterclaim effectively bars Rule 54(b) certification, the Third Circuit has issued an open invitation to the filing of facially adequate but substantively

22. *See* note 9, *supra,* and the accompanying text at 13-14. The majority opinion below specifically referred to GE's counterclaim as "compulsory." 597 F.2d at 36 (222a). Unless this reference was gratuitous, it reflects a basic misunderstanding of *Sears* and *Cold Metal.*

weak counterclaims.[23] Except in the rare case where summary judgment on the counterclaim is a practical alternative,[24] delay and the encouragement of time-consuming and costly litigation are the inevitable results of the Third Circuit's holding in this case. The court of appeals should not limit the use of Rule 54(b)

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23. The present case is illustrative of these detrimental, if not absurd, results. Here, payment of a liquidated and undisputed debt in the amount of $18,914,408 for goods sold, delivered and in use by GE has been delayed by the mere allegation of an unproven and unliquidated counterclaim involving an alleged expenditure by the counterclaimant of less than $2 million, which GE alleges it seeks to recover for the ultimate benefit of the United States Government. *See* GE's Answers to Interrogatories Nos. 61 and 74 (266a-272a, 278a-282a).

The remainder of GE's counterclaim is not for any out-of-pocket losses. Rather, GE claims that by providing Curtiss-Wright with assistance in performance of the 21 contracts it prevented Curtiss-Wright from incurring a major default on the contracts, thereby saving Curtiss-Wright in excess of $52 million which GE now claims it is entitled to recover on the theory that Curtiss-Wright has been "unjustly enriched." *See* GE's Answers to Interrogatories Nos. 54, 61 and 74 (264a-266a, 273a-282a). Despite its unjust enrichment theory, in its appellate brief below GE conceded that Curtiss-Wright "lost substantial sums of money" in its performance of the subcontracts. *See* Brief for Appellant General Electric Company at 3 (filed in the Third Circuit Court of Appeals on October 24, 1978).

Thus, GE takes the ludicrous position that, if Curtiss-Wright had defaulted Curtiss-Wright would have suffered a net loss in excess of $52 million, but because of GE's technical assistance Curtiss-Wright remains liable to GE not only for the alleged cost of the assistance, $1.912 million, but also for the same $52 million although it completed the contracts! *See* the dissenting opinion of Judge Gibbons below sur the denial of the petition for rehearing. 599 F.2d at 1263 (257a).

24. The remedy of summary judgment will not often be available, especially in complex litigation where factual issues are inevitable and the discovery required to reach the stage where summary judgment can even be considered is often time consuming. Any doubt as to the existence of a genuine issue of fact must be resolved against the party moving for summary judgment. *See generally* 6 *Moore's Federal Practice, supra,* ¶ 56.15.

for the convenience of its own calendar. As Judge Gibbons has aptly stated:

> "In commercial litigation it requires little imagination for lawyers to conjure up facially plausible though factually weak counterclaims. Experienced lawyers and judges are all too familiar with the possibilities for delay inherent in liberal federal discovery rules. District judges on the scene are particularly well situated to exercise informed judgment as to when the entry of a final judgment on a complaint will remove the incentive for time consuming and costly litigation over 'imaginative' counterclaims. They are, moreover, conscious of the fact that resolution, favorably or unfavorably, of a legal issue dispositive of the plaintiff's claim will frequently produce a climate in which serious settlement negotiations will commence and often succeed. The concern of appellate judges for their own caseloads should not blind them to the reality that by limiting the use of Rule 54(b) they are depriving their brothers in the district court of a significant tool in the management of trial court caseloads." Dissenting opinion of Judge Gibbons below sur denial of petition for rehearing. 599 F.2d at 1263 (256a).

B. The Third Circuit's holding that the mere pendency of a counterclaim with the possibility of a setoff is a barrier to the entry of final judgment under Rule 54(b) absent "unusual or harsh circumstances" is ill-defined and ill-considered and ignores the interrelationship between Rules 54(b) and 62(h).

There is simply no basis in the federal rules for the Third Circuit's position that the mere possibility of a future setoff, absent "unusual or harsh circumstances," precludes the district

court from entering final judgment and enabling plaintiff to execute thereon. *See* II A, *supra,* at 20-23.

Rule 54(b) was designed to permit the *entry* of final judgment on less than all the claims in litigation when there is no just reason for delay. It is apparent that any and all questions relating to the effect of a subsequent judgment or judgments in the cause were intended to be considered under Rule 62(h): This rule provides:

> "(h) Stay of Judgment as to Multiple Claims or Multiple Parties. When a court has ordered a final judgment under the conditions stated in Rule 54(b), *the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary* to secure the benefit thereof to the party in whose favor the judgment is entered." Fed. R. Civ. P. 62(h) (emphasis added).

The language of Rule 62(h) leaves no doubt that all relevant questions of possible setoffs, solvency and economic duress are properly to be considered within the context of that rule. Under Rule 62(h) the court is empowered to fashion remedies to deal with these and other factors which may bear upon the enforcement of a Rule 54(b) money judgment "until the entering of a subsequent judgment or judgments" on the remaining claims.

Depending on the facts of each case, the court may conclude that the pending counterclaim either warrants a stay of enforcement,[25] does not warrant a stay,[26] or necessitates the

25. *See, e.g., Omark Industries, Inc. v. Lubanko Tool Co., Inc.*, 266 F.2d 540 (2d Cir. 1959).

26. *See, e.g., In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439, 442 n.4 (1st Cir. 1972); *Robbins Flooring, Inc. v. Federal Floors, Inc.*, 445 F. Supp. 4 (E.D.Pa. 1977); *Almar Supply Co. v. Weber-Stephen Products Co.*, 15 Fed. R. Serv. 2d 853 (E.D. Pa. 1971).

imposition of conditions to secure the benefits of the judgment to the party in whose favor the judgment was entered.[27]

In cases such as the present, when the pendency of a counterclaim does not otherwise present a just reason for delay, the counterclaim should be viewed as a neutral factor in the Rule 54(b) analysis. This conclusion is not only mandated by *Cold Metal* but also because there exists at least an equal potential that a counterclaimant, such as GE, will fail to prove its case.[28]

In every case, however, it is clear that where otherwise there "is no just reason for delay" economic considerations such as setoff, solvency, or economic duress are relevant only to questions of enforcement under Rule 62(h). The Third Circuit has mistakenly attempted to convert Rule 54(b) into a rule which governs the timing of the enforcement of judgments. By its very terms, however, Rule 54(b) has nothing to do with enforcement of judgments and contains no mechanism to deal with any factors which may bear upon that issue. In its opinion below and in *Allis-Chalmers,* the Third Circuit, contrary to the great weight of authority,[29] has inexplicably ignored Rule 62(h).

27. *See, e.g., Norris Manufacturing Co. v. R. E. Darling Co., Inc.*, 315 F.2d 633 (4th Cir. 1963); *Bond Industrial Equipment Sales Co. Inc. v. Whiting Corp.*, 114 F. Supp. 161 (S.D.N.Y. 1953).

28. *See* Judge Rosenn's dissenting opinion below, 597 F.2d at 39 (229a). *See also,* Judge Gibbons' dissenting opinion below sur denial of the petition for rehearing, 599 F.2d at 1262 (255a): "Common sense suggests that where both parties are solvent the party whose claim is liquidated in amount and reduced to judgment generally has the stronger claim to possession of the disputed fund during the litigation of the remaining claims." Other commentators are in accord with Judge Gibbons' view. *See* Comment, 56 B.U.L. Rev. 579, 592-93 (1976); Note, 54 N.C.L. Rev. 1265, 1274 (1976).

29. The cases cited in notes 25-27, *supra,* make clear that Rule 62(h) provides the district court with the options necessary to deal with all questions of enforcement of judgments entered under Rule 54(b). Numerous other decisions leave no doubt that the Third Circuit is improperly utilizing Rule

(Cont'd)

In this case, in lieu of properly deferring to Rule 62(h) the Third Circuit has reached what it concedes is a harsh result from Curtiss-Wright's point of view by holding that a pending counterclaim posing the possibility of setoff is a barrier to the entry of a final money judgment under Rule 54(b) absent "unusual or harsh circumstances." The court, moreover, has compounded this error by failing to provide a coherent definition or even a clear example of "unusual or harsh circumstances." The only hint of what the Third Circuit intends appears in a cryptic footnote in *Allis-Chalmers* describing such circumstances as those "factors involving considerations of solvency, economic duress, *etc.*" (emphasis added).[30]

The standard of "unusual or harsh circumstances" as set forth by the Third Circuit not only fails to provide the district

(Cont'd)

54(b) to deal with considerations, such as possible setoffs, which are appropriate for disposition under Rule 62(h). *See, e.g., Gutor International AG v. Raymond Packer Co., Inc.*, 493 F.2d 938 (1st Cir. 1974); *Navajo Tribe of Indians v. United States*, 364 F.2d 320 (Ct.Cl. 1966); *Ziegler Chemical and Mineral Corp. v. American Gilsonite Co.*, 332 F.2d 668 (9th Cir. 1964); *Wisconsin Liquor Co. v. Park & Tilford Distillers Corp.*, 267 F.2d 928 (7th Cir. 1959); *F. & M. Schaefer Corp. v. Electronic Data Systems Corp.*, 430 F. Supp. 988 (S.D.N.Y. 1977); *Beaunit Corp. v. Glentex Corp.*, Civ. No. 76-369 (S.D.N.Y. Oct. 7, 1977) (slip); *St. Marie & Son, Inc. v. Hartz Mountain Corp.*, 414 F. Supp. 71 (D. Minn. 1976); *Tire Sales Corp. v. Cities Service Oil Corp.*, 410 F. Supp. 1222 (N.D. Ill. 1976); *Curtis Publishing Co. v. Church, Rickards & Co., Inc.*, 58 F.R.D. 594 (E.D. Pa. 1973); *Reines Distributors, Inc. v. Admiral Corp.*, 31 F.R.D. 187 (S.D.N.Y. 1962), *rev'd on other grounds*, 319 F.2d 609 (2d Cir. 1963); *Metro Corrugated Containers, Inc. v. Owens-Illinois Glass Co.*, 185 F. Supp. 359 (E.D.N.Y. 1960); *Morand Bros. Beverage Co. v. National Distillers and Chemical Corp.*, 25 F.R.D. 27 (N.D. Ill. 1959); *Emerson Radio & Phonograph Corp. v. Hendrix*, 20 F.R.D. 572 (S.D.N.Y. 1957); *cf. Bethlehem Steel Corp. v. Tishman Realty & Construction Co., Inc.*, 72 F.R.D. 33, 39 (S.D.N.Y. 1976).

30. 521 F.2d at 366 n.14. The majority opinion in the present case saw fit not to elaborate. The meaning of "etc." remains a mystery. The Third Circuit may be unable to agree on the definition of this factor as demonstrated by the split vote on the petition for rehearing *en banc* in this case (246a-247a).

courts with any meaningful guidance, but also is obviously unworkable under Rule 54(b).

The court has erroneously compelled the district court to consider factors properly relevant only to Rule 62(h) when exercising discretion under Rule 54(b). By so dictating the Third Circuit has effectively precluded the district court from ever entering a final judgment under Rule 54(b) when as here there is a pending monetary counterclaim and has reduced Rule 62(h) to a virtually useless appendage to the Federal Rules of Civil Procedure. This result is contrary to the internal logic and structure of the rules.[31]

To the extent that considerations of setoff, "solvency, economic duress, etc." are factors which may in some cases be relevant to the question of enforcement, these factors are obviously properly considered within the context of Rule 62(h) which is intended for just such situations.[32]

31. Rule 62(h) was expressly adopted to deal only with Rule 54(b) final judgments. *See* Advisory Committee Note to 1946 Amendment, 28 U.S.C.A. Fed. R. Civ. P. 54(b).

32. The *Allis-Chalmers* majority opinion itself, though ignoring Rule 62(h), unintentionally reveals that the standard of "unusual or harsh circumstances," *i.e.*, factors of "solvency, economic duress, etc." is relevant only to the issue of whether plaintiff should be permitted immediate enforcement of his judgment. The court queried:

> "Is [defendant's] financial condition such that [plaintiff] might in any way be prejudiced by postponing *execution* on its judgment until [defendant's] counterclaim was fully adjudicated? Conversely, is [plaintiff's] financial condition such that [defendant] might be prejudiced if [plaintiff] was allowed immediate *execution* on its judgment before adjudication of [defendant's] counterclaim?" 521 F.2d at 365 (emphasis added).

Whether *execution* should be "immediate" or "postponed" is obviously a matter for disposition under Rule 62(h), as this matter is one of enforcement.

C. The district court's entry of final judgments in this case is well within the letter and the spirit of Rule 54(b) under any logical interpretation thereof, and the final judgments should be reinstated.

As we have indicated in Point I, *supra*, a basic purpose of Rule 54(b) is to avoid injustice caused by a delay in judgment on a distinctly separate claim in a case involving multiple claims.

In the present case there is no question that irrespective of whose standard is used to evaluate injustice or hardship, that standard has been satisfied insofar as Curtiss-Wright is concerned. It hardly seems necessary to state a reason in holding that depriving Curtiss-Wright of almost $19 million dollars to which it is presently entitled is unjust and harsh.

The district judge below, in his analysis of the factors which he considered in connection with his entry of final judgment, had little difficulty appreciating that due to the injustice arising from the disparity between the prejudgment rate of only 6 percent simple interest per year and modern day interest rates,[33] Curtiss-Wright would suffer "daily financial losses" for a protracted period from a failure to enter final judgment (198a).

In his dissent below, Judge Rosenn likewise considered Curtiss-Wright's financial loss as an appropriate factor favoring the entry of final judgment:

> ". . . If this court were to hear the appeal certified by the district court and to sustain the district court's judgment, Curtiss-Wright could execute immediately. Because of the disparity between six percent simple interest and the much higher interest rates now prevalent in the marketplace, Curtiss-Wright will lose (as GE

33. As of the date of this brief the "prime rate" of interest is 15.5 percent.

> conceded at oral argument) over a million dollars per year until this litigation can be finally consummated. This could conceivably take years to complete.
>
> * * *
>
> . . . [W]hen the judgment is for a very large sum of money, and the current cost of money is exceptionally high, the substantial loss to the creditor caused by further delay must be weighed by the [district] court."[34]

Judge Rosenn also noted that aside from the losses occasioned by the disparity in the interest rates, Curtiss-Wright was unjustly being deprived of the actual use of the money judgment in its own operations.

The reasoning of the district court below and Judge Rosenn in his dissent is in accord with *United Bank of Pueblo v. Hartford Accident & Indemnity Co.*, 529 F.2d 490 (10th Cir. 1976), where the Tenth Circuit considered a delay as brief as 10 months in collecting a $50,000 judgment to constitute "a financial injustice" in light of a high interest rate in the marketplace, and held that the district court had properly considered this factor in its determination to enter final judgment pursuant to Rule 54(b). When the amount of the judgment and length of the delay involved in the present case are compared to that in *United Bank of Pueblo, supra*, it cannot seriously be argued that the district court below abused its discretion by taking into consideration the financial injustice which would result from its failure to enter final judgment.

As set forth in his dissent from the denial of the petition for rehearing, Judge Gibbons would hold that in a civil action

34. 597 F.2d at 37-38 (225a-227a).

between two solvent parties any needless delay in obtaining possession of the benefits to which one is entitled under a valid judgment is the "*precise* 'harsh circumstance' that Rule 54(b) is intended to prevent." 599 F.2d at 1264 (260a). Judge Gibbons' concomitant view[35] is that Rule 62(h) is the appropriate rule under which to consider possible setoffs and other economic factors. This view appears to prevail throughout the federal court system except in the Third Circuit.[36]

The majority opinion below itself acknowledged the obvious injustice to Curtiss-Wright by indicating that from Curtiss-Wright's viewpoint its holding would be "harsh." In spite of the obvious injustice, the court adopted an interpretation of Rule 54(b) that makes the possibility of a setoff in and of itself a "just reason for delay" that apparently can be overcome, if at all, only by a showing of some exaggerated type of harshness or unusual circumstances. This interpretation of the rule affords a type of protection to GE not authorized by Rule 54(b) because, obviously, if any such protection is appropriate it exists under Rule 62(h). This erroneous interpretation also places an unreasonable burden upon Curtiss-Wright, especially in light of the ambiguous guidelines that the appellate court has baselessly adopted. These "guidelines" have no effect other than to confuse and obstruct the exercise of the district court's discretion under Rule 54(b).

Rule 54(b) is a mechanism to avoid injustice — not cause it. The rule was adopted to avoid injustice occasioned by delay in final resolution of a judgment where the adjudicated claim is "distinctly separate" from the remaining claims in suit.[37] That

35. Expressed in his dissenting opinion in *Allis-Chalmers*, 521 F.2d at 373-74.

36. *See* notes 25-27, 29, *supra*, and the accompanying text at 26-27.

37. 28 U.S.C.A. Fed. R. Civ. P. 54(b), Advisory Committee Note to the 1946 Amendment, *quoted in relevant part in* note 4, *supra*. The Advisory (Cont'd)

the circumstances in this case meet every criteria under any logical interpretation of the letter and spirit of the rule is beyond question.

The Third Circuit has turned a rule which was intended to grant relief to a judgment creditor in circumstances such as exist in this case into one judically rewritten to afford unintended benefit to a judgment debtor solely because of the existence of an unadjudicated counterclaim. The appellate court is in error, has misapplied the rule and has reached an unjust result which in future cases can only lead to a continuing denial of justice to litigants. The position of the Third Circuit with respect to Rule 54(b) must be rejected.

If ever there were a case for which Rule 54(b) was intended

(Cont'd)

Committee Note is of special interest for a number of reasons. First, it nowhere indicates that money judgments on distinctly separate claims are to be excluded from possible 54(b) certification. Second, the Note specifically refers to Rule 62(h) for stays of enforcement of judgments certified under the rule. Thus the Note fully supports the position taken in this brief that final money judgments on distinctly separate claims can be entered under the rule in the district court's discretion and that factors which are relevant to enforcement are to be considered in the context of Rule 62(h). The Note's reference to "infrequent harsh case" apparently has been the source for the Third Circuit's standard of "unusual or harsh circumstances." The language in the Note, however, appears to reflect nothing more than the Advisory Committee's opinion that situations involving "distinctly separate claims" available for Rule 54(b) certification will be exceptional. The Note is basically concerned with the confusion which original Rule 54(b) engendered because the rule in its original form made it unclear when judgments were final and when the time for appeal began to run. There is absolutely nothing in the Note which supports the Third Circuit's view that the loss of benefits of a money judgment resulting from delay requires some sort of special hardship beyond the delay itself before final judgment may be entered. Interestingly one commentator has noted: "[T]he historical context of the amendment seems to indicate that the [Note's] reference to the necessity of an infrequent, harsh case was inadvertent and was intended to reduce the exorbitant flow of appeals of *non-final* adjudications that had developed under the former rule." Note, 54 N.C.L. Rev. 1265, 1272-73 (1976) (emphasis added).

it is the case before this Court. Curtiss-Wright has demonstrated that it has met every criteria of the rule and Supreme Court precedent, and has satisfied any rational conception of injustice or harshness which could have been anticipated by the framers of the rule.

CONCLUSION

For the foregoing reasons, the judgment of the Third Circuit Court of Appeals (262a) should be vacated and the case should be remanded to the court of appeals with a direction to reinstate the orders of final judgments of the district court entered on July 28, 1978 (200a) and August 29, 1978 (214a) respectively.

Respectfully submitted,

RALPH N. DEL DEO
RICHARD S. ZACKIN

CRUMMY, DEL DEO,
DOLAN & PURCELL
Attorneys for Petitioner

David Lasky
Alfred J. Kovell
Of Counsel